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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 119.

Filed Nov. 15, 1902.

THE DIAMOND GLUE COMPANY,

Plaintiff in Error,

vs.

THE UNITED STATES GLUE COMPANY,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

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SUPREME COURT OF THE UNITED STATES.

THE DIAMOND GLUE COMPANY,

Plaintiff in Error,

vs.

THE UNITED STATES GLUE COMPANY,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

This action was brought for damages by reason of the refusal of the defendant in error to permit further performance of an executory contract.

This contract was made June 25, 1898, and provided:

That the defendant in error, a Wisconsin corporation, should within sixty days, select a site and with the least possible delay thereafter, erect, equip and complete a glue factory on this site.

That plaintiff in error, an Illinois corporation should

1. Supervise the construction of the factory.

2. Should "*have the management of the manufacturing in said factory and operate the same for*" defendant in error and furnish a superintendent and give the factory personal supervision.

3. Equip the factory and supply it with a capable superintendent.

4. "*Control, handle* and sell the entire output, including glue and by-products of such factory."

5. Refrain from manufacturing, at any of its factories, either hide or calf glue after the factory of defendant in error should go into operation, during the life of the agreement.

6. Guarantee all sales.

7. Receive a commission on sales for its compensation.

The contract was to endure for five years. (Pr. Tr., p. 10-11.)

Within the sixty days mentioned, defendant in error selected a site in Milwaukee County, Wisconsin, and proceeded to erect and equip and complete a glue factory thereon, (Pr. Tr., p. 4-25) and began in November or December, 1898, to erect a factory. (Pr. Tr., p. 35-54.) The factory was completed and went into operation about the 25th of July, 1899. (Pr. Tr., p. 5-25.)

Both in its original complaint and in its amended complaint, the plaintiff in error alleges specifically that it has, as stipulated in the contract, refrained from manufacturing either hide or calf glue at any of its factories, and closed down its factories which had been used for that purpose, and generally, that it has in all respects, fully complied with the terms and conditions of the contract to be performed on its part. (Pr. Tr., p. 5-25.)

The defendant in error pleaded as one defense, that practically all the things which were done, or attempted to be done by the said plaintiff under the contract set out in the complaint, were done by it after the first day of September, 1898.

That said plaintiff has never filed, or caused to be filed in the office of the Secretary of State of the State of Wisconsin, any copy of its charter, articles of association or incorporation, or in any way complied with the statutes of the State of Wisconsin in regard to foreign corporations; or in any way complied with, or performed any of the provisions of Sec. 1770 B of the Revised Statutes of the State of Wisconsin for the year 1898; and that all acts of the plaintiff under the alleged contract after the first of September, 1898, were done in violation of the laws of the State of Wisconsin, and that the contract was, and is wholly void as to, and on behalf of the plaintiff; and that it has and can have no cause of action arising therefrom, for the reason that the attempted performance of the contract was in violation of the statutes.

Sec. 1770 B. of the Revised Statutes of Wisconsin, or so much thereof as is germane to this case, is as follows:

"No corporation . . . incorporated or organized otherwise than under the laws of this state (with certain exceptions, not material to this case), shall transact business, or acquire, hold or dispose of property in this state until such association, company, partnership or corporation shall have caused to be filed in the office of the Secretary of State, a duly authenticated copy of its charter, articles of incorporation or of co-partnership, and all amendments thereto which may have been made, while it shall continue to do business therein . . . The failure to comply with any of the provisions of this section shall, for the first such violation, subject the association, company, corporation or co-partnership, or any agent, officer or person acting for it in this state, to a penalty of five hundred dollars, to be sued for and recovered, etc. . . . (with penalty for subsequent violations). Every contract made by or on behalf of any such association, company, corporation or co-partnership affecting the personal liability thereof, or relating to property within this state before it shall have complied with the provisions of this section, shall be wholly void on its behalf, and on behalf of its assigns, but shall be enforcible against it or them."

This section further provides that such filing of its articles shall be deemed a stipulation that process against the corporation may be served on the Secretary of State of Wisconsin, with safeguards as to notice to be given to the corporation by such state officer.

At the time this suit was commenced, (February 5, 1900) and at the time of the alleged breach of the contract in December, 1899, (Pr. Tr., p. 13.) and at the time of the completion of the factory, this statute stood amended,—all references to co-partnerships having been stricken out by Sec. 27, Chap. 351, Laws of Wis. for the year 1899. Approved May 4, 1899.

This amendment also added to Sec. 1770 B. the following: "No corporation which has deposited in the office of the Secretary of State a written instrument in compliance with Sec. 1750 A. of the Annotated Statutes, shall be required to make any further deposit of its articles under this act."

There is not, and never was any section of the Revised Statutes of Wisconsin known as Sec. 1750 A.

In 1889 Messrs. Sanborn & Berryman issued what are called the Annotated Statutes of Wisconsin, which the re-

vision of 1898 (Sec. 4977) provides may be referred to as the "Annotated Statutes." These statutes, compiled by Messrs. Sanborn & Berryman, were adopted by the Wisconsin Legislature by Chap. 222 of the laws of 1889, and therein designated as "The Annotated Statutes of Wisconsin."

Sanborn & Berryman's Annotated Statutes, p. 2141.

In these "Annotated Statutes" occurs a section known as 1750 A., but it applies only to corporations and associations "formed for the purpose of transporting of passengers or property, either by boats, vessels, rail, stages or other means,"—being Chap. 193 of the Laws of Wisconsin for 1880, as amended by Chap. 189 of those laws for the year 1881.

So that this reference to Sec. 1750 A does not concern the case at bar.

To this defense challenging the legality of the contract, and of performance under it, plaintiff in error demurred for insufficiency. (Pr. Tr., p. 21.)

Upon argument, this demurrer was overruled. (Pr. Tr., p. 22.) Upon this demurrer, the question as to the validity and applicability of the Wisconsin Statute mentioned, was considered and determined, and the learned District Judge handed down an opinion sustaining the defense and directing that the demurrer be overruled, and giving his reasons therefor. This opinion is found at pp. 30-32 of the printed transcript.

The demurrer of the plaintiff in error to this defense was never withdrawn; but an amended complaint was served, differing from the original complaint in that it alleged that the defendant operated the plant; whereas, in the original complaint it was alleged that the plaintiff operated the factory.

The original complaint, the demurrer to this defense, and the opinion of the Court sustaining the defense and overruling the demurrer, are made a part of the bill of exceptions. (Pr. Tr., pp. 29-32.)

Various other defenses were interposed which, in so far as they are here for consideration, appear in the motion to direct a verdict, as hereinafter set out.

Upon the evidence adduced, the defendant below (the defendant in error here), moved the Court to direct a verdict in its favor, for the reasons:

1. That the defense first referred to was established, namely: That the plaintiff was a foreign corporation, and had not filed its articles in the State of Wisconsin, nor complied with its laws.

2. On the ground that the contract sued upon contains a stipulation essential to it, which is in restraint of trade, and in violation of the statutes of Wisconsin, which prohibit combinations or arrangements to restrict production of any article which is an article of commerce in the state.

3. That it appears by the plaintiff's own proof that as agent of the defendant, it has been disloyal, in that it has not diligently and properly attempted to sell the output of the plaintiff, but has represented competing concerns, in violation of the duties assumed by it as an agent of the defendant.

4. That it appears by the plaintiff's proof that it violated its agreement to refrain from the manufacture of hide and calf glue, in that, after the execution of the contract with the defendant the plaintiff undertook and carried on the manufacture of hide and calf glue in an establishment in Gowanda, N. Y., whose output was greater than the total amount of this kind of glue made by the plaintiff.

5. That the contract of the plaintiff is *ultra vires* of the plaintiff.

6. That it appears from the plaintiff's proof that it had failed to perform the conditions of the contract, namely: the sale of the output, or of a substantial part of the output of the factory of the defendant, and had repudiated its obligation to sell or that any obligation rested upon it in the premises. (Pr. Tr., p. 109.)

The Court below directed a verdict for the defendant, holding that the contract was for the transaction of business in the State of Wisconsin, and that inasmuch as the plaintiff had not complied with the laws of that state, it had no right to perform its contract, and hence could maintain no suit for its breach. (Pr. Tr., pp. 110-111.)

The learned District Judge in directing this verdict made the following statement: "I have been, through the trial and the examination, quite strongly impressed with another view, and that is, of the showing of the doing of business by the plaintiff, notwithstanding the contract, with other parties, which it seemed to me, would be a business necessarily in antagonism to that of the defendants in this case; and if so, that of itself, would be a breach on their part, which would authorize the setting aside of the contract by the defendant. The testimony in that regard entirely appears on the plaintiff's showing and is undisputed,—the fact of the transaction with the Gowanda Company. I deem it proper to allude to it, but it would not make any difference with my ruling." (Pr. Tr., p. 111.)

The testimony referred to by the trial judge is that of Mr. Morron, Vice-President of the plaintiff in error, found at p. 50 of printed transcript: "I think we sold about 500,000 (pounds) for the U. S. Glue Company. We got the rest of the hide and calf glue handled by us from the Gansler & Fischer factory, Gowanda, N. Y., which was less than was sold for the U. S. Glue Company. I think the Gowanda factory went into operation in the early part of 1899. Our relations to that factory were under practically the same contract as with the U. S. Glue Company. That contract was made in 1898. The estimated capacity of the Gowanda factory is a million and a half to two million pounds." At pages 52-53 of the printed transcript, he testifies that they sold about 118,000 pounds of hide and calf glue from the Gowanda factory.

Validity and scope of the Wisconsin Statute.

The Supreme Court of the State of Wisconsin has, since the trial of the instant case, passed upon the statute under consideration, and has not only held it to be a valid statute, but has given to it the broadest effect which its words admit.

This decision of the court of last resort of the State of Wisconsin, at least as to the construction to be given this statute, will be adopted and followed by this court.

Waters-Pierce Oil Co. vs. Texas, 177 U. S., 28-43.

The decision referred to is Ashland Lumber Co. vs. Detroit Salt Co., et al., 89 N. W. Rep., 904, the decision having been rendered on the first day of April, 1902.

The Wisconsin court in its opinion construes the law as follows: "We must hold that the words 'shall be wholly void on its behalf, and on behalf of its assigns, but shall be enforcible against it and them,' mean just what they say; and, if they are valid, they render the contract in question absolutely void and a nullity, in so far as it is sought to be enforced on behalf of the defendants by way of counter claim in this action."

The circumstances of that case rendered the application of this rule exceedingly harsh, since the party actually affected was a natural person, who was associated with a foreign corporation as a co-partner or co-adventurer, and so had to trace his right of action through the contract.

On the question of the validity of the statute, the Wisconsin court bases its conclusion upon the decisions of this court beginning with Paul vs. Virginia, 8 Wall., 168-181; and the Wisconsin Court concludes: "We must hold that the statute in question is valid, however harsh its provisions may seem to be."

It is established, therefore, that the decision of the Court below was correct, if the statute in question is applicable to the case at bar.

This Court has so many times re-affirmed the doctrine of Paul vs. Virginia, that there can be no longer any question that the power of a state to totally exclude foreign corporations, or as a condition of recognition, to impose such terms and conditions as the state may think proper, is plenary, except in one instance only, namely: "Where a corporation created by one state vests its right to enter another and to engage in business therein, upon the federal nature of its business."

Hooper vs. California, 155 U. S., 648-652.
Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727.

It will be noted that the statute of Wisconsin in the first instance absolutely prohibits a foreign corporation from transacting business, or acquiring, holding or disposing of property in the state until it shall have complied with the law; and in the second place, makes any breach of this provision of the statute penal.

Without being obliged, therefore, to have recourse to the last section of the statute expressly avoiding any contract made in contravention of the law, the statute makes illegal the continuance of the acts which defendant refused to permit plaintiff to perform; and these acts being declared illegal by the statute, no court sitting in that state could give to plaintiffs any redress for the refusal of the defendant to permit a continued violation of the law.

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727-733.
Bank vs. Owens, 2 Peters, 527-539.
Miller vs. Ammon, 145 U. S., 421-426.
Aetna Ins. Co. vs. Harvey, 11 Wis., 394.
McCanna & Fraser Co. vs. Citizens, &c. Co., 76 Fed. Rep., 420 (U. S. Cir. Ct. App.).

It was suggested in the Court below that the fact that the statute in question purported to cover cases of co-partnership as well as corporations made it unconstitutional, and the case of Barnes vs. People, 168 Ill., 425, was cited to support this proposition.

Undoubtedly the statute was void as to natural persons residing in other states, and the Illinois case cited holds this, and no more. The claim that the attempt of the legislature to cover co-partnerships infected the statute so as to make it wholly void, can not be sustained; since it is perfectly apparent upon the face of the act, and from the subsequent action of the Wisconsin legislature that the inclusion of partnerships was not the main purpose of the act, or in any way essential to it, but is separable and may be treated as null without affecting the main purpose of the statute.

Cooley Const. Limitations, 209, 211.

Allen vs. Louisiana, 103 U. S., 80, 83.
Virginia Coupon Cases, 114 U. S., 305.
Baldwin vs. Franks, 120 U. S., 678, 689.

The case does not come within the exception of Interstate Commerce.

The power of the state in the premises is limited only by the implication of exclusion arising from the grant of power to Congress to regulate interstate commerce. That which the state can not regulate is merely that which Congress may regulate.

It has been held that the power of Congress in this regard is confined to actual intercourse, and not to contemplated sales.

Coe vs. Errol, 116 U. S., 517.

That manufacturing corporations and all other corporations whose business is of a local and domestic nature are subject to the control of the state.

Crutcher vs. Kentucky, 141 U. S., 47, 49.

And this, irrespective of the proposition that a part of the business of such manufacturing corporation may be the sale of its products in other states.

U. S. vs. E. C. Knight Co., 156 U. S., 1, 13.
Prentice & Egan's Commerce Clause, p. 326, et seq.
Hopkins vs. U. S., 171 U. S., 578.

Examining the contract in controversy, we find that as conditions precedent to any liability on the part of the defendant, it was agreed that the plaintiff "shall have *the management of the manufacturing in said factory, and shall operate the same* for the party of the first part and furnish a superintendent . . . shall give said factory such personal super-

vision as may be necessary from time to time in the operation of the same."

That the plaintiff should keep the factory supplied with a capable superintendent.

That it shall "*control*, *handle* and sell the entire output of the factory." (Pr. Tr., p. 11.)

It is as plain as the English language can make it that this is a stipulation for the "transaction of business" within the State of Wisconsin within all definitions.

The circumstance that some of the products might be sold without the State of Wisconsin, and so moved across the boundary of that state, is accidental and not of the essence of the contract. Thus the case comes directly within the case of

U. S. vs. Knight Co., *supra*, and
Hopkins, vs. U. S., *supra*.

The terms and meaning of the contract.

It will be noted that by its terms the contract was transitory. There was no stipulation that the factory should be located in Wisconsin. Defendant could have performed on its part by selecting a site in Missouri or in any other state.

The site was actually chosen about the first of July, 1898, some time after the execution of the contract. (Pr. Tr., p. 34.)

The factory was completed the latter part of July, 1899. (Pr. Tr., p. 35.)

So that when the five-year term began, during which plaintiff in error had agreed to transact business in Wisconsin, i. e., operate the factory, etc., the law was operative as amended by the Act of 1899.

Two things, therefore, appear:

1. That the localization of the contract was no part of the agreement itself, but was subsequently effected by the acts of the parties; and,

2. That by the contract and these subsequent acts, the plaintiff in error intruded itself into the State of Wisconsin, for a long term beginning at a then future date.

And the claim made here by plaintiff in error is that by so localizing the contract, the parties denuded the state of a portion of its sovereignty.

Every executory contract of a corporation to transact business in a foreign state is conditioned as matter of law upon the continuance of license from that state to come within its borders.

No foreign corporation can, by making a long-term executory contract, disable a state from excluding it from its territory.

It is rudimentary that a corporation has no legal existence outside of the state creating it. Recognition of it by other states is a matter of grace or comity upon which in the nature of things can be based no vested right to continued recognition.

This would seem axiomatic. A foreign corporation transacts business within another state by virtue of a license which is at all times revocable, unless it can be contended that indulgence on the part of the state destroys its sovereignty in this regard.

It will be noted that here is no question of property rights acquired under an executed contract, but the question is purely and simply, whether a foreign corporation by its own executory contract, can abridge or destroy the powers of the sovereign.

It is as though the permissive user of a right of way should claim to acquire a vested right therein by binding himself by contract with a third person to use the right of way for a term of years.

It would seem to be clear that a foreign corporation finding itself within the State of Wisconsin as a matter of grace, could not by its own act acquire any vested right, as against the state, to continue domicile therein.

As stated by the Missouri Court in

State, ex rel Crow vs. Fireman's Fund Ins. Co.,
45 L. R. A., 363, 377.
s. c., 152 Mo., 1,

it is a misconception to suppose that any corporation can by complying with existing comity laws, acquire any vested rights which can not be affected by subsequent changes in such laws.

Doyle vs. Ins. Co., 94 U. S., 535.

"Having the right to impose such terms as it may see fit upon a corporation of this kind as a condition upon which it will permit the corporation to do business within its borders, the State is not thereafter and perpetually confined to those conditions which it made at the time that a foreign corporation may have availed itself of the right given by the State, but it may alter them at its pleasure. In all such cases there can be no contract springing from a compliance with the terms of the act, and no irrepealable law, because they are what is termed "governmental subjects," and hence within the category which permits the legislature of a State to legislate upon those subjects from time to time as the public interests may seem to it to require."

Mutual Life Ins. Co. vs. Spratley, 172 U. S., 602, 621.

The statute in question cannot be said in any way to impair the obligation of a contract.

The contract in question was made on the 25th day of June, 1898. (Pr. Tr., p. 3.) The statute is part of the Revised Statutes of Wisconsin for the year 1898. These were passed at a special session of the legislature for the year 1897, and were approved by the Governor August 20, 1897. It was provided by Chapter 379 of the laws of 1897 that "upon the preparation of said statutes of 1898, before the same shall be published, there shall be appended thereto a certificate of two of the Justices of the Supreme Court that the provisions of this Act, of said Revision Bill and said Chapter 306 of the Laws of 1895, have been complied with in their preparation and publication, which certificate shall be published in connection with said statutes, and the same shall be evidence as provided in said Chapter 306 of the Laws of 1895."

The Chapter cited also provides "that the said statutes of 1898 shall take effect and be in force on and after the first day of September, 1898."

The certificate of the Justices of the Supreme Court required was made and dated on the 2d day of May, A. D. 1898. (R. S. of 1898, p. 2922.)

By said Chapter 306 of the Laws of 1895 Messrs. Sanborn and Berryman were authorized to prepare and publish the public general laws of the state which should be in force at the close of the session of the legislature of 1897, and when published such statutes were to be *prima facie* evidence of their passage and publication and should be known as the "Wisconsin Statutes of 1898."

The certificate of the Justices of the Supreme Court certifies that "the preparation and publication of said Statutes of 1898 has been and is in all respects in compliance with all of said acts."

It will appear then that the statute in question was complete as a legislative act at the time the contract in controversy was executed, although the time when the statute should become operative was postponed until the succeeding September by the provisions of the statute itself. (Section 1978.)

Workman vs. Worcester, 118 Mass., 168.

The contract under consideration was executed June 25, 1898, nearly two months after the statutes had been approved, certified and published; and the performance of the contract was not to be entered upon, and was not entered upon in fact, until after the statutes had gone into effect. (Ground was not broken for the erection of the factory until November, 1898. Pr. Tr., p. 35.)

The contract did not contemplate any performance, or entry upon performance, until after the law should have become fully operative. The agreement stated that a site should be selected by the defendant by the 25th of August, 1898, and *thereafter* the building of the factory should be commenced. The performance of the main part of the contract,

namely,—the operation of the factory, was of course not to begin until after the completion of the factory, which would necessarily be long after the 1st of September, 1898, and occurred in fact in July, 1899 (Pr. Tr., p. 35.); and the contract was by its terms to endure for a term of five years from the last named date.

Thus at the time the contract was entered into, performance under it had been forbidden by the legislature, except upon compliance with the terms of the act. The effect of the statutes is the same as though it had been an enactment operative *in presenti* and forbidding the transaction of business within the State of Wisconsin after September 1, 1898, except upon compliance with certain conditions.

The error alleged, and upon which the jurisdiction of this Court depends, is a violation of that part of Section 10, of Article I, of the Federal Constitution, reading as follows: "No state shall * * * pass any * * * law impairing the obligation of contracts."

After the execution of the contract in question, no law was passed by the State of Wisconsin affecting it, nor has the legislature of that state acted in this regard since the contract was made. The law which defendant relied upon and which the Court below says, made illegal the performance of this contract, was passed by the State of Wisconsin before this contract was entered into. The mere fact that its operation was postponed until a later date does not make the legislative act concurrent in point of time with the later date.

This Court has held that before it can be asked to determine whether a statute has impaired the obligation of a contract, it must be made to appear that there was a legal contract subject to impairment.

> New Orleans vs. New Orleans Waterworks Co., 142 U. S., 79.

As has been stated, at the time of the passage of this act, there was no contract subject to impairment, and it seems

obvious that a statute can not impair the obligation of a contract which did not exist when it was enacted. This was expressly held in

Lehigh Water Co., vs. Easton, 121 U. S., 388-391.
Pinney vs. Nelson, 183 U. S., 144-147.

Again, the obligation of this contract was not in any way impaired, for the reason that the contract, having been made after the passage and publication of the statute, it was necessarily made with a view to the statute, and subject to its terms. The plaintiff was bound to take notice that the thing which it bound itself to do, namely: To operate this factory in Wisconsin, would be illegal unless it complied with the laws of that state. As is held by the Illinois Court in

Ford vs. Milk Shippers Assn., 155 Ill., 166-181.

And as is inferentially held in

Pinney vs. Nelson, *supra.*

And directly decided in

Stine vs. Bennett, 13 Minn., 138-143,

the plaintiff and all other persons were required in June, 1898, to take notice of the existence and terms of this statute "and that at the time appointed, its provisions would be operative for all purposes."

In other words, this statute being a part of the law at the time the contract was entered into, supplied in itself, one of the measures of the obligation of the contract. This statute entered into the contract and was part of it; and it would be a contradiction in terms to claim that it impaired the obligation which it constituted and measured.

Griffin vs. Mayor &c., 5 Mart. La., 279.
See Johnston vs. Fay, 16 Gray, 144.

The obligation on the defendant in this contract was to perform the same, provided the plaintiff made performance on its part legal by compliance with the law.

The statute in question, even if retroactive, did not impair the obligation of the contract.

All that the statute in question required, was that the plaintiff in error should file its Articles with the Secretary of State of the State of Wisconsin, and so submit itself to the jurisdiction. Compliance was in no way difficult, and the expense attending compliance was simply the payment of twenty-five dollars.

The Legislature, in the exercise of its undoubted right to impose conditions upon foreign corporations, "passed a law which was just, easy to be complied with and necessary to secure, in many cases the exercise" of the right of the domestic party to the contract.

Curtis vs. Whitney, 13 Wall., 68-71.

In that case and in Jackson vs. Lamphire, 3 Pet., 290, this Court held that the obligation of a contract is not necessarily impaired by a statute which affects it retroactively, or because such statute enhances the difficulty of performance to one party, provided that it leaves the obligation of performance in full force.

Under the act in question here, no legal right of plaintiff was taken away. "He is simply required to observe a formality imposed by the statute. By the observance of this formality all his rights are preserved to him unimpaired."

Coulter vs. Stafford, 15 U. S. App., 118-123.

This Court in

McCracken vs. Hayward, 2 Howard, 608, 612,

defined the obligation of a contract as "the law which binds the parties to perform their agreement." "The obligation of the contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other."

And this is impaired only when a subsequent law "affects to diminish the duty or to impair the right."

Or as stated in

Ogden vs. Saunders, 12 Wheaton, 213, 259,

"The law of the contract forms its obligation" and in the same case, at page 302, "the obligation does not inhere and subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract."

Cooley Constitutional Limitations, 344-345.

It was styled by the Roman lawyers "juris vinculum," being the duty of performance imposed upon the one party and the right to exact performance conferred upon the other. The statute expressly saved the right of plaintiff in error and in no way purported to relieve defendant in error from its duty.

The judgment should be affirmed because the plaintiff's proof shows conclusively that it had substantially failed and refused to perform the contract on its part.

The plaintiff had three factories at which in June, 1898, it was manufacturing hide and calf glue. (Pr. Tr., p. 33.) A part of the contract on its part was that "during the life of this agreement, beginning as soon as said factory is in operation, the party of the second part (plaintiff in error) is to refrain from manufacturing either hide or calf glue at any of their factories." (Pr. Tr., p. 11.) The amended complaint of the plaintiff alleges (Pr. Tr., p. 25) that "as soon as said factory was in operation said plaintiff then refrained, and has at all times since refrained, from manufacturing either hide or calf glue at any of its factories, and did thereupon close down its factories before that time used for the manufacture of hide and calf glue, and has not operated the same since said date."

The testimony of the plaintiff discloses that it did close down its factories, but that after the contract was made with the defendant, plaintiff made a similar contract with a manufacturing concern in Gowanda, New York, and did thereafter operate the factory at Gowanda, which had a capacity of from a million and one-half to two million pounds; that the

plaintiff manufactured hide and calf glue at this factory and sold it in the market (Pr. Tr., p. 50); and it appears from the testimony of the plaintiff (Pr. Tr., p. 49) that its sales for the year 1899 of hide and calf glue were upwards of a million and one-half pounds, of which only 500,000 pounds came from the defendant in error. (Pr. Tr., p. 50.)

The following dilemma presents itself to the plaintiff in error:

Either its agreement with the defendant in error to refrain from the manufacture of hide and calf glue was in unreasonable restraint of trade, and therefore tainted the whole contract and made it illegal, so that no action could be based on it; or

The stipulation was justified solely on the ground that it was necessary to enable the other party to the contract to secure the other benefits stipulated for therein, namely: loyalty on the part of the plaintiff in error as its exclusive sales agent.

As to the first alternative, Sec. 1791j of the Revised Statutes of Wisconsin forbids corporations organized under the laws of Wisconsin "from entering into any combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, or constituting a subject of trade or commerce therein, or . . . to limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state." This statute is merely declaratory of the common law, making it specifically applicable to domestic corporations, with the penalty of forfeiture of their charters.

Section 3207 of the Revised Statutes of Wisconsin imposes this prohibition upon foreign corporations as well,—the last clause of the Section being as follows: "But such foreign corporation can not maintain an action founded upon an act or upon any liability or obligation, expressed or implied, arising out of or made or entered into in consideration of any act which the laws of this state forbid a corporation or any association of individuals to do without express authority of law."

Of course, if interstate commerce was contemplated, there would be the additional ban of the Act of Congress of July 2, 1890.

That no cause of action can arise out of a contract having this inherent vice, is settled by:

Cravens vs. Carter-Crume Co., 92 Fed., 479.
U. S. vs. Addyston Pipe & Steel Co., 85 Fed., 271.
Aff. by this Court, 175 U. S., 211-237.
U. S. vs. Knight Co., 156 U. S. 1-16.
Ford vs. Chicago Milk Assoc., 155 Ill., 166.

The law of Wisconsin on the subject of restraint of trade is well stated in

Richards vs. American Desk & Seating Co., 87 Wis., 503, 513:

"All restraints are presumed to be bad, but if the circumstances are set forth, that presumption may be excluded and the court is to judge of these circumstances whether the contract be valid or not." "It is essential in order not to be unreasonable, that the restraint imposed must not be larger than is plainly required for the protection of the party with whom the contract is made; and whether it is reasonable in a given case is a question not of fact *but of law for the Court.*"

It is urged that the restraint stipulated for is reasonable; this contention can be based only on the proposition that the stipulation "is plainly required for the protection of the party with whom the contract is made," namely, the defendant in error; and such protection could only be against disloyalty on the part of the plaintiff in error, as its exclusive sales agent, and to guard the defendant in error against competition in sales at the hands of its own agent.

Harrison vs. Glucose Sugar Refining Co., 116 Fed. Rep. 304-308 (U. S. Cir. Ct. App.).
Horner vs. Graves, 7 Bing., 735.

Conceding, then, that this stipulation was for the protection of the defendant, for that by it the plaintiff agreed that while it was the exclusive sales agent of defendant it would not be in the field as a competing manufacturer, then it appears conclusively by the plaintiff's own proof that it has violated this essential stipulation. It closed its own factories and built another, and was at the time of the alleged breach of the contract a competing manufacturer, and selling its own product in competition with the product of the defendant.

This is not a technical objection but is most substantial. It appears from plaintiff's proof that it had failed to sell more than 22 per cent. of the output of defendant's factory and that the continued accumulation of unsold product was certain to bankrupt the defendant. (Pr. Tr., pp. 48, 96, 97.) Of course the quantity of glue sold from the Gowanda factory satisfied the market to that extent and diminished to that extent sales of defendant's product and increased the accumulation.

As is intimated by the learned District Judge who tried the case, this is sufficient to disentitle the plaintiff to any relief. (Pr. Tr., p. 111.) "I have been through the trial and the examination quite strongly impressed with another view, and that is, of the showing of the doing of business by the plaintiff, notwithstanding the contract, with other parties, which, it seemed to me, would be a business necessarily in antagonism to that of the defendant's in this case, and if so, that of itself would be a breach on their part which would authorize the setting aside of the contract by the defendant. The testimony in that regard entirely appears on the plaintiff's showing and is undisputed—the fact of the transaction with the Gowanda Company."

Since the contract can be saved only by the theory that this provision was inserted for the protection of the defendant, that is,—to insure loyalty on the part of the plaintiff as its agent, it follows that any breach of this part of the contract on the plaintiff's part warranted and justified abandonment and repudiation by the defendant.

Were this stipulation not in the contract, the mere fact that plaintiff entered into a similar contract with the Gowanda concern, whereby it became a rival and competitor of the defendant, justified abandonment by the latter.

Dieringer vs. Meyer, 42 Wis., 311.

Mechem's cases on Agency, 289, 291, and cases cited.

Plaintiff was employed as the exclusive sales agent of the defendant. It was of the essence of such employment that it should not enter into any relations which interfered with or were antagonistic to the duty which plaintiff thereby assumed. This proposition is abundantly justified by the authorities cited, and seems to be clear as a matter of principle.

A fortiori, where a stipulation of this kind is expressed in the contract, it is of the essence.

It is uniformly held that where performance by the plaintiff goes to the root of the consideration of the contract, the failure to perform on the part of the plaintiff, or its refusal to perform, or the manifestation by it of an intention not to perform the contract according to its terms or to be bound by its terms, justifies the abandonment of the contract by the defendant.

F. L. & T. Co. vs. Galesburg, 133 U. S., 156.

Armstrong vs. St. P. &c. Iron Co., 48 Minn., 113, 119.

L. S. & M. S. R. R. vs. Richards, 30 L. R. A., 33, and note.

Plaintiff's covenant in this regard was plainly not independent, since "the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties, as it appears on the instrument, and by the application of common sense to each particular case."

Lowber vs. Bangs, 2 Wall., 728-736.

Defendant in error was justified in refusing further performance under the contract for the reason that plaintiff in error had not only substantially failed to perform its contract in relation to the sale of the output, but had actually repudiated any obligation in this regard.

Defendant in error, in moving the Court to direct a verdict, based its motion in part upon the following ground: (Pr. Tr., p. 109.) "Sixth. That it appears from the plaintiff's proof that it had failed before the 1st of December, 1899, to perform the conditions on its part to be performed, namely: the sale of the output or of a substantial part of the output of the factory of the defendant, and repudiated its obligation to sell, or that it was bound to sell, or that any obligation rested upon it in the premises."

The Court below did not pass upon this ground of motion, but under the cases of

Whitney vs. N. Y. &c. R. Co., 102 Fed. Rep., 850, and

Currier vs. Trustees of Dartmouth College, 117 Fed. Rep., 44, (both in the Circuit Court of Appeals of the First District),

this defendant is entitled to rely here upon any ground which was fairly presented in its motion for direction of a verdict, regardless of the particular ground which determined the action of the Court. This is based on the reason stated in

Sullivan vs. Mining Co., 143 U. S., 431-434,

that if on all the facts in the case the judgment is one which must necessarily have been rendered, it must stand. And this case is within the suggestions of

Peck vs. Heurich, 167 U. S., 624-629,

inasmuch as it is clear beyond doubt that affirmance on this ground can not prejudice the rights of the plaintiff in error.

Without going into figures, it appears that large quantities of glue were being manufactured at this factory from day to day—from 10,000 to 15,000 pounds every day. (Pr. Tr., p. 58.)

It appears from the testimony of the executive officer of the plaintiff in error (Pr. Tr., p. 38) that the main reason given

by the defendant in error for refusing to continue the contract was the accumulations of glue unsold; that over 80% of the entire product of the factory was being piled up in the warehouse and that the plaintiff in error was selling but a very small portion of this output (Pr. Tr., p. 48); that when pressed as to their ability to sell a reasonable portion of this output, merely evasive answers were given (Pr. Tr., pp. 48 & 49); that in correspondence which took place preliminary to the refusal of the defendant in error to be further bound by the contract (Pr. Tr., pp. 96, 97 & 98), it was charged on the part of the defendant, and not denied by the plaintiff, that only about one-fifth of the product was being sold; that the remainder was being piled up in the warehouse, and that the defendant either had to cease operation at its factory or become insolvent if these conditions continued.

The written contract, which was signed by both parties, fixes the rights and obligations of the parties in this regard as follows: "It is further agreed that said party of the second part (plaintiff in error) shall control, handle and sell the entire output." (Pr. Tr., p. 11.)

The breach of this contract charged on the defendant in error is alleged to have occurred on the 1st day of December, 1899. On the 22d day of November, 1899, plaintiff in error by its letter (found at p. 97 of the Pr. Tr.) expressly repudiates the idea that any obligation rests upon it in regard to the sale of glue, and states that the meaning of the contract is simply that the plaintiff in error is to be the exclusive selling agent of the factory; that is to say, that this part of the contract is unilateral, and is for the benefit of the plaintiff in error, and that no corresponding obligation is assumed by it whatever.

The testimony on behalf of the plaintiff in error discloses the facts, which are emphasized by this correspondence, not only that it had not sold even a substantial part of the output of defendant's factory, but claimed that it was under no obligation to sell any of this product, and that it would proceed in this regard as the interests of plaintiff in error might dictate. Plaintiff in error declared in effect that if it chose so

to do, it might refrain from selling any of the product of defendant's factory, and require all of that output to be piled up to await the pleasure of plaintiff in error.

The terms of this agreement seem to bind plaintiff in error to sell the entire output of defendant's factory. Of course this must be construed reasonably and in accordance with customs of trade and conditions of the market, if any are shown. No such excuses are given in this case, but it does appear that plaintiff in error was forestalling the market with goods which it was manufacturing at and selling from its factory in Gowanda.

Whatever may have been the limit of obligation which this clause of the contract imposed upon the plaintiff in error, it clearly imposed some obligation; and when plaintiff in error repudiated any liability or obligation in the premises and at the same time failed or refused to sell more than one-fifth of the product in question, it certainly repudiated the contract on its part, and in addition substantially failed in performance.

Under the case of

Cresswell R. & C. Co. vs. Martindale, 27 U. S. App., 277,

this warranted the abandonment of the contract by the defendant in error, and amounted to a substantial breach on the part of the plaintiff in error which disabled it from maintaining an action against the other party for failure or refusal to perform.

Norrington vs. Wright, 115 U. S., 188.

It is perfectly apparent that one of the main considerations moving to the defendant in error for the contract in question was the agreement of the plaintiff in error to sell its product. Any interpretation of this contract which makes it give to the plaintiff in error the right to tie up all the product or the major part of the product of the factory without any corresponding obligation to sell on its part, is not only preposterous as matter of law, but is unconscionable as a matter of morals.

The contention of plaintiff in error in this regard was that it might use the product of this great factory simply for the purpose of affecting the market so that it (the plaintiff in error) might reap the profits of such manipulation by sales of goods produced by itself as a rival manufacturer.

We submit that the default of plaintiff in error and its declarations in this behalf, justified the action of defandant; and that the judgment should be affirmed on this ground, even if it stood alone.

The only breach alleged and the only cause of action presented is that on the second day of December, 1899, defendant "definitely stated to plaintiff that the said contract was at an end, and refused to be further bound thereby, or to allow the plaintiff to make further sales thereunder." (Pr. Tr. 26.)

For this breach the complaint alleges that "plaintiff has sustained damages in the sum of two hundred thousand dollars." (Pr. Tr., p. 27.)

Before the *ad damnum* clause, the complaint enumerates the classes of damages as follows:

Commissions already earned on sales.

Services in supervising construction of factory, etc.

Losses from closing down plaintiff's other establishments, and

Loss of profits which might have been made by performing the contract. (Pr. Tr., p. 26.)

This is not the case, therefore, suggested in

U. S. vs. Behan, 110 U. S., 338-345,

where plaintiff upon wrongful stoppage of the contract, elects to rescind it and recover on *quantum meruit*.

But plaintiff has elected "to go for damages for the breach of the contract," and must trace his right to damages through the contract and can recover nothing unless the stoppage of performance was wrongful. That is to say, all damages are in the same category, and all depend upon plaintiff's right to perform.

Roehn vs. Horst, 178 U. S., 1.

The contract is an entirety. The stipulation for planning and supervising the construction of a factory are preliminary only and call for no compensation. The term of the contract, five years, does not begin until the factory is in operation, at which time begins the main portion of the contract, viz.: the operation of the factory and sale of its products.

No compensation is considered except as it is to be derived from the last step,—sales of product,—and is measured by commissions thereon.

If, as the Court below held, the continued performance of the contract was illegal, as constituting transaction of business within the State of Wisconsin, the inference which that Court draws is irresistible, viz:—"that refusal by defendant to carry on the transactions in deliberate violation of the statute, constituted no actionable breach of the contract." (Opinion Judge Seaman, Pr. Tr., p. 32.)

This inference being sustained, it necessarily follows that no legal damages can ensue; and it is immaterial from what source the alleged damages arise, since there being no *injuria*, there can be no recovery.

If plaintiff had commenced an action to recover the commissions which it is alleged were earned, it would still fail, since its right to recovery must be traced through the illegal contract. Its action would then be to recover compensation for an *executed* portion of a contract forbidden by law, that is, for transacting business in Wisconsin; that is to say, in part, for operating the factory. This part, if it alone were illegal, would so infect the whole contract and the right of recovery, as to avoid the whole.

McMullen vs. Hoffman, 174 U. S., 639-654, et seq.
C., M. & St. P. Ry. vs. R. R., 61 Fed. Rep., 993.
Oliver vs. Gilmore, 52 Fed Rep., 562.

It would be inconsistent and illogical to say that plaintiff could not recover prospective damages for the reason that the breach was not actionable; and then to hold it entitled to damages already accrued from the same breach; or to hold

that plaintiff may prevail upon the portion of his contract which was legal by refusing to refer to the portion which was illegal.

McMullen vs. Hoffman, *supra*,
and cases cited page 656.

We submit therefore, that the verdict was properly directed by the Court below, and that the judgment should be affirmed:

1st. For the reason given in his opinion by the learned District Judge, that the provisions of the Wisconsin statute "took effect on September 1, 1898, and incapacitated the plaintiff to transact business thereafter in the state except on submission to the requirements of the statute. But performance became illegal without such compliance on the part of the plaintiff, and that refusal by the defendant to carry on the transactions in deliberate violation of the statute constituted no actionable breach of the contract." "It is sufficient that performance became illegal without fault or concurrence on the part of the defendant"; (Pr. Tr., p. 32.) and

2d. On the ground that the plaintiff in error proved its own disloyalty to the defendant in error, its principal, and proved its own substantial breach of the contract and so warranted the abrogation of the contract.

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